

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य,
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।

BEFORE SHRI D. KARUNAKARA RAO, AM
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.932/PUN/2016
निर्धारण वर्ष / Assessment Year : 2007-08

Shri Sunil Chhagan Bhaybhang,
Kamlkant Arcade,
Patil Lane No.4,
College Road,
Nashik - 422 005
PAN : ABRPB9456F

.....अपीलार्थी / Appellant

बनाम / V/s.

Pr. Commissioner of Income-tax-1,
Nashik

.....प्रत्यर्थी / Respondent

Assessee by : Shri Pramod Shingte
Revenue by : Shri S.B. Prasad

सुनवाई की तारीख / Date of Hearing : 18-12-2018
घोषणा की तारीख / Date of Pronouncement : 07-03-2019

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal by the assessee is directed against the order of Principal Commissioner of Income Tax (Appeals)-I, Nashik dated 30-03-2016 passed under section 263 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

2. Shri Pramod Shingte appearing on behalf of the assessee submitted that this is second round of litigation before the Tribunal. In the first round, the assessee had approached the Tribunal in ITA No.215/PN/2011 assailing the order of CIT(A) confirming addition of Rs.41,15,000/- under section 69 in respect of land purchased from

Pingle family. The Tribunal vide order dated 11-06-2012 had restored the issue back to the file of AO with specific directions to verify the fate of additions in respect of alleged 'on-money' payment by the assessee in the hands of vendors of the land. Consequent to the directions of the Tribunal, the assessment order dated 28-03-2014 was passed by the AO u/s.143(3) r.w.s.254 of the Act. The AO after making detailed enquiry and verifying the land transaction threadbare made no addition in the hands of assessee. Thereafter, the Pr. CIT invoked the provisions of section 263 qua the same land transaction between the assessee and Pingle family on the ground of lack of enquiry by the AO. The ld. Authorized Representative submitted that show cause notice u/s.263 was issued to the assessee on 29-02-2016. Same is placed at page 65 of the paper book. The trigger point for invoking the provisions of section 263 is Internal Audit objection and not the independent view of the Pr. CIT. The internal audit objection report of the Department is at pages 48 to 52 of the paper book. The ld. Authorized Representative submitted that the reply of the AO dated 09-03-2015 to Internal Audit is at pages 53 to 58 of the paper book. A perusal of the same would show that the provisions of section 263 have been invoked as a matter of precaution to protect the interest of Revenue. The ld. Authorized Representative submitted that the proceedings carried out under section 263 on the basis of internal audit report is not sustainable. To support his contention, reliance was placed on the judgment of Hon'ble Bombay High Court in the case of Ranka Jewellers Vs. Addl.CIT reported as 328 ITR 148. The ld. Authorized Representative finally submitted that at the most it can be a case of inadequate enquiry not lack of enquiry. Even under such circumstances, invoking of provisions of section 263 is bad in law.

3. Shri S.B. Prasad, representing the Department vehemently defended the impugned order. The Id. Departmental Representative submitted that the AO failed to conduct proper enquiry in respect of land transaction despite categoric directions from the Tribunal, therefore, the Pr. CIT was constrained to invoke the provisions of section 263.

4. Heard both sides. Orders of the authorities below perused. We have also considered the documents furnished by the assessee in the form of paper book. A perusal of documents on record revealed that the issue relating to purchase of land by the assessee from Pingle family had travelled to the Tribunal earlier in an appeal filed by the assessee in ITA No.215/PN/2011 (supra). The Tribunal vide order dated 11-06-2012 restored the issue back to the file of AO with the following directions :

“9. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the Paper Book filed on behalf of the assessee. We find in the instant case the AO made addition on the basis of the statement of Mr. Deepak Pingle, one of the sellers that he has received extra money over and above the cheque amount towards sale of the agricultural land. However, it appears that no opportunity for cross examining the above party by the assessee was afforded by the AO. It is not the case of the revenue that the assessee was given an opportunity to cross examine the said party and the assessee has denied or refused to cross examine the party. Therefore, we, in the interest of justice, deem it proper to restore the matter back to the file of the AO with a direction to verify as to what has happened in the hands of the sellers in case they have received any extra money over and above the sale price. Further the AO shall also give opportunity to the assessee to cross examine the seller whose statement was the basis for the addition in the impugned appeal. Accordingly, we restore the issue to the file of the AO for adjudication of the issue afresh and in accordance with law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed for statistical purpose.”

Consequent to the directions of Tribunal, the AO conducted enquiries and again summoned Deepak V. Pingle, one of the sellers of property u/s.131 of the Act. Opportunity was given to the assessee to cross examine Deepak V. Pingle. It was thereafter that the AO passed a assessment order u/s.143(3) r.w.s. 254 accepting returned income, which is now subject matter of revision u/s.263.

5. The ld. Authorized Representative has asserted that the revision proceedings u/s.263 have been initiated consequent to the objection raised by the Internal Audit Department. A perusal of the reply by the AO to the internal audit objection at pages 53 to 58 of the paper book reveals that initially the AO has defended the assessment order and has refuted the objections of ITO (Internal Audit). However, in the latter part of the reply, as a matter of precaution and to protect the interest of Revenue, approval was sought for submitting proposal u/s.263.

6. The intent of section 263 is not to substitute the opinion of AO but to protect the interest of Revenue where the order is erroneous and prejudicial to the interest of Revenue. Thus, twin conditions as set out in section 263 have to be satisfied to assume revisional jurisdiction u/s.263 of the Act. It is a well settled law that where the enquiry has been conducted by the AO and has passed assessment order taking one of the possible views, the provisions of section 263 cannot be invoked by the CIT to substitute his view or to meet with the objections raised by Internal Audit party. The Hon'ble Bombay High Court in the case of Ranka Jewellers Vs. ACIT (supra) has held that where the AO has applied his mind on the issue and has taken a possible view, the

CIT is not justified in exercising power of revision u/s.263. The relevant extract of the findings on the issue are as under :

“9. The order that has been passed by the CIT under s. 263 proceeds on the basis that the AO did not consider the applicability of s. 40A(3) while determining the undisclosed income and hence, the order appears to be erroneous and to be prejudicial to the interests of the Revenue. There is merit in the submission of the assessee that this finding is contrary to the record. The record shows that the AO had applied his mind to the issue of the violation of s. 40A(3) during the course of the assessment proceedings by calling for a special audit on several items including the question as regards cash transactions which fell within the purview of s. 40A(3). Similarly, the Tribunal also proceeded on the basis that the record before it did not contain any discussion on the issue. This aspect of the finding of the Tribunal suffers from the same error as the order passed by the AO. Though the assessment order did not contain a specific reference to the applicability of s. 40A(3), the response of the AO to the audit query shows that it was his view that those provisions were not applicable to the facts of the present case. The AO supported his view with reference to decisions of the Tribunal. This view of the AO was also affirmed by the CIT. In the circumstances, the exercise of the power under s. 263 cannot be sustained. The revisional jurisdiction could not have been exercised where a possible view was taken on the applicability of s. 40A(3) based on decisions of the Tribunals. It is a settled principle of law that if the view which was taken by the AO is a possible view, it would not be within the jurisdiction of the revisional authority to exercise the power under s. 263.”

7. The ld. DR has pointed that during First Appellate proceeding the assessee had conceded that disallowance u/s.69 of the Act should be restricted to Rs.34,65,000/- and not Rs.41,15,000/-. Reference was made to letter dated 25-03-2010 from assessee at page 107 of the paper book. We have examined the said letter from assessee and observe that the concession was made without prejudice to the main relief sought in Ground Nos. 1 to 3 of the appeal seeking deletion of entire addition of Rs.41,15,000/-. Thus, such concession would not be detrimental to the main relief sought by assessee. Be that as it may, now the AO has granted relief to assessee in fresh proceedings, the assessee is at liberty to raise fresh pleas consequent to opportunity

of cross-examination of vendor of property, the opportunity that was earlier denied to the assessee. Based on fresh evidence the AO granted relief to the assessee.

8. We find merit in the submissions of the assessee. In the present case, it cannot be said that no enquiry was carried out by the AO, at the most it is a case of inadequate enquiry. Even in that case, the provisions of section 263 cannot be invoked. The Explanation 2(1) to Section 263 inserted by the Finance Act 2015 w.e.f. 01-04-2015 would not change the matrix of case as the amendment would not apply retrospectively. Thus, in the facts of the case, impugned order is set aside and the appeal of assessee is allowed.

9. In the result, appeal of the assessee is allowed.

Order pronounced on Thursday, the 07th day of March, 2019.

Sd/-
(D. KARUNAKARA RAO)
ACCOUNTANT MEMBER

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 07th March 2019
Satish

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-I, Nashik
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// सत्यापित प्रति //

Senior Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	01-03-2019	Sr.PS
2.	Draft placed before author	01-03-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		